IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO.332 OF 2007

In

S.C. SUIT NO.19 OF 2007

Kirit Lalji Assar & Anr. : Appellants
(Orig.Plaintiffs)

V/s.

Kishin R. Kesaria & Ors. : Respondents
(Orig.Defendants)

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Mr.Sanjay Udeshi i/b. Ghanshyam K. Tripathi for the appellants.

Mr.J.A.Udaipuri i/b. H.V.Prithwani for the respondents.

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CORAM : S.A.BOBDE, J.

DATE : JULY 6, 2007.

P.C.

1. This appeal from order is against the order dated 28.3.2007 refusing injunction to the appellants. The appellants took out a Notice of Motion for restraining the respondents from making certain constructions on the ground that the appellants have not given any consent for such construction. According to the appellant, his consent is necessary as he owns a flat on the 1st floor in the suit building.

2. The learned trial Court has rejected the Motion for injunction.

3. The main contention of Mr.Udeshi, the learned counsel for the appellants, is that the appellant has given permission to the respondents to make certain constructions under M.O.U. dated 25.10.2002. However, the M.O.U. was subject to the respondents doing some work which they had agreed. Clause (III) of the M.O.U. which contains the consent of the appellant reads as follows:-

> "III) AND WHEREAS, the Owners of the Part - I are desirous and propose to construct, add, alter and extend the existing building on C.T.S. No.653/S.Plot No.36B, Pestom Sagar, Plot No.11-A, with Thatta Niwasi, on ground floor, Part of the 4th Floor and three more floors above and upon the entire 4th floor thereto without altering the existing flats internally and they have applied for passing of the proposed Plans by the Municipality."

In pursuance thereof, the appellant has further given consent to the B.M.C. for construction to be done by the respondents on 10.10.2002. The consent reads as follows:-

> "I, Kirit Lalji Assar, the Owner of Flat No.101 on 1st Floor, 11-A, The Thatta Niwas Co-op. Hsg. Soc. Ltd., Chembur, Mumbai--400 089.
>
> Joint Owners Shri Kishin R. Kesaria, Rekha

> K. Kesaria & Ghansham R. Kesaria want to construct additional proposed Ground floor, Part 4th floor & 3 more floors above the 4th floor over the existing building.
> I have No objection for purpose of additional construction and TDR utilization for the existing building at above site by them.
>
> The building plans submitted by them through Shri B.H.Wadhwa, Architech plans may be approved".

4. Now the construction by the respondents is not completely in accordance with the M.O.U. In other words, they are not doing all the construction which is contemplated by the M.O.U. They are doing less. There is no dispute that the M.O.U. is in force.

5. Mr.Udeshi, the learned counsel for the appellants, however, submitted that the respondents should not be allowed to construct because they have not complied with the obligations which were imposed on them under the M.O.U. There is no action taken by the appellants for enforcing the terms of the M.O.U. In the circumstances, I am of view that the learned trial Court has not committed any error or illegality in refusing the injunction.

6. The appeal is, therefore, dismissed.

7. In view of the dismissal of the appeal, Civil Application no.476 of 2007 does not survive and the same

stands disposed of.

S.A. BOBDE, J.